IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 77-1258

THE STATE OF MINNESOTA,
by WARREN SPANNAUS, its Attorney General,
Petitioner,

v.

FIRST OF OMAHA SERVICE CORPORATION,
Respondent.

No. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Petitioner,

v.

FIRST OF OMAHA SERVICE CORPORATION,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

MOTION OF THE FIRST NATIONAL BANK OF CHICAGO FOR LEAVE TO FILE BRIEF AMICUS CURIAE

BRIEF OF THE FIRST NATIONAL BANK OF CHICAGO AS AMICUS CURIAE

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The First National Bank of Chicago ("FNBC"), a national banking association located in Chicago, Illinois, moves the Court for leave to file a brief amicus curiae in these cases. The consent of respondent has been obtained; the consent of petitioners has been refused.

FNBC is an issuer of VISA (formerly BankAmericard) credit cards, and more than 400,000 of its cardholders are

residents of states other than the state in which it is located. These non-Illinois cardholders are charged interest at the rate allowable under Illinois law. Since the outcome in this Court may directly and substantially affect FNBC in the future conduct of its business, its interest in these cases is real. Moreover, petitioners seek to overturn the bellwether ruling of the Court of Appeals in *Fisher* v. *First Nat'l Bank of Chicago,* 538 F.2d 1284 (7th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977), which interpreted Section 85 of the National Bank Act so as to allow national banks to charge interest at rates allowed by the state in which they are located on loans to residents of other states. FNBC was the prevailing party in that case.

Here, respondent is in the position of a bank that has announced its intention to enter into credit card agreements with residents of another state and, as a result, was subjected to petitioners' attempt to enjoin it from going forward with its plans. In contrast, FNBC and many other national banks are now, and have been for some time, charging interest based on the analysis of Section 85 approved by the Court of Appeals in *Fisher.* FNBC thus brings an added perspective to the issues before the Court and will not simply echo respondent's arguments.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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by WARREN SPANNAUS, its Attorney General,
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STATEMENT OF INTEREST

Chartered in 1863, The First National Bank of Chicago ("FNBC") is one of the oldest national banks in the United

States. It is also a leader in the development of bank credit card systems. FNBC was a founding member of the Midwest Bank Card system in the mid-1960's and later was the first major issuer of BankAmericard (now VISA) cards in the midwest. Today, FNBC has more than one and one-half million VISA accounts. Of these, more than 400,000 are with residents of states other than Illinois, including more than 4,000 with Minnesota residents.

FNBC has always charged a uniform rate of interest and has always used the rate allowed by Illinois law. In 1971, this practice was challenged by an Iowa cardholder, who argued that Iowa law should govern his account. The controversy was fully litigated and, in 1976, the Court of Appeals ruled that the Illinois rate of interest was properly applied. *Fisher* v. *First Nat'l Bank of Chicago,* 538 F.2d 1284 (7th Cir. 1976). This Court declined to review that decision. 429 U.S. 1062 (1977).

The decision in *Fisher* is central to the issues raised in the present case. Specifically, petitioners seek to undercut *Fisher* by arguing, in part, that the National Bank Act was never intended to apply to interstate loans, a point which was taken for granted in *Fisher.*

FNBC has a real interest in preserving the vitality of the *Fisher* ruling. To change from a system using a single, uniform rate of interest to one applying the rate of each state in which a cardholder resides would be costly and needlessly so. But, more importantly, such a result would serve only parochial interests and defeat both the letter and the spirit of Section 85 of the National Bank Act.

SUMMARY OF ARGUMENT

Fisher v. *First Nat'l Bank of Chicago,* 538 F.2d 1284 (7th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977), correctly decided that a national bank may lawfully charge the rate of interest allowed by the state in which the bank is located, *i.e.,* the state in which its principal office is found. "Located" as used in the National Bank Act has always been interpreted to refer to the location of the bank offices, and never to mean the residence of customers.

The application of Section 85 cannot be limited to intrastate loans. Contrary to petitioner's assertions, interstate bank transactions were common in the nineteenth century. It is inconceivable that in 1864 Congress intended to regulate only an aspect of *intrastate* commerce, while leaving the regulation of comparable *interstate* commerce to the several states.

The Conference of State Bank Supervisors, as amicus curiae, urges the Court to overrule *Tiffany* v. *National Bank of Missouri,* 85 U.S. 409 (1874). Since that issue is not raised by the parties, it should not be even considered by the Court. But in no event should *Tiffany* be overruled. There is no general purpose in the National Bank Act to maintain equality between national and state banks in all respects. In some respects national banks are clearly favored over state banks; interest rates are one example. The unanimous opinion of the Court in *Tiffany* was virtually contemporaneous with the legislation, has been repeatedly followed by later courts and the Comptroller of the Currency, and has never been altered by Congress despite numerous revisions of the National Bank Act and Section 85.

Finally, if the Court were to overrule *Fisher,* the decision should not be retroactive, since that would unfairly ex-

pose banks that relied on *Fisher* to claims of usury. Overruling *Fisher* would establish a new principle of law that could not have been anticipated by those banks, and retroactive application would not further the purpose of Section 85, which is to give national banks guidance as to the interest rates they may charge.

ARGUMENT

I. SECTION 85 OF THE NATIONAL BANK ACT APPLIES TO INTERSTATE LOANS.

Petitioners argue that Section 85 of the National Bank Act does not apply to loans made by a national bank to residents of another state (Marquette Nat'l Bank Br. at 12, 18, 28-32) and that the "plain language" of Section 85 should simply be ignored. (State of Minnesota Br. at 28-20). Understandably, neither petitioner disputes that, if Section 85 applies and is read "plainly," it means that a national bank may lawfully charge the rate of interest allowed by the state where the bank is located on out-of-state loans. Nor do petitioners dispute that a national bank is located only in the state where its principal office and place of business is located. In its amicus brief, the Conference of State Bank Supervisors ("Conference") argues that a national bank is "located" wherever it transacts business (Conference Br. at 48), an argument swiftly rejected in *Fisher*.

The term "located," which is used throughout the National Bank Act, *e.g.*, 12 U.S.C. §§ 24, 28, 30, 32, 36, 64a, 85, 94, 142, 143, 144, 182, 192, 202, 548, has always been understood to mean the state in which the bank's principal office is found. Thus, in *Bank of America* v. *Whitney Central Nat'l Bank,* 261 U.S. 171, 172-73 (1923), the Court held that a national bank having its principal office in New Orleans was not located in New York even though it was also doing extensive business in New York. And in *Klein* v. *Bower,* 421 F.2d 338, 342 (2d Cir. 1970), the Court expressly rejected the contention that a national bank in Scranton was "'located" in New York because it did business there through an agent.

The Court's recent decision in *Citizens & Southern Nat'l Bank* v. *Bougas,* 434 U.S. 35 (1977), makes a narrow exception to the even stricter rule that a national bank is located in the place where its *principal* office is found by permitting venue to lie in districts where the national bank has branch offices, which cannot be in another state. *See* 12 U.S.C. § 36. That is a far cry from a holding that a bank is located wherever its customers reside— a conclusion that would have eliminated the need for the Court's decision in *Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148 (1976). In *Radzanower,* plaintiff sought to use Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, to take advantage of the provision for venue in the district where the defendant "transacts business." The Court held that Section 27 did not apply to actions against national banks and that venue was covered by Section 94 of the National Bank Act, 12 U.S.C. § 94. If the place where a national bank is "located" were deemed to be any place it transacts business (in the sense of the places where its customers reside), Section 94 would be as broad as Section 27, and *Radzanower* would have been a meaningless exercise.

Given the long line of decisions rejecting contentions that a national bank was located in a different state from that of its principal office, *e.g., National City Bank* v. *Domenech,* 71 F.2d 13, 16 (1st Cir. 1934), *aff'd,* 294 U.S. 199 (1935); *Buffum* v. *Chase Nat'l Bank,* 192 F.2d 58 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); *Klein* v. *Bower, supra; Helco, Inc.* v. *First Nat'l City Bank,* 470 F.2d 883 (3d Cir. 1972), the Court in *Bougas* surely did not intend to overrule these decisions *sub silentio.*

A. Section 85 Cannot Be Limited to Intrastate Loans.

The notion that Section 85 provides an interest rate only for a national bank's *intrastate* loans apparently was first

advanced in *Meadow Brook Nat'l Bank* v. *Recile,* 302 F.Supp. 62 (E.D. La. 1969). It was adopted by Judge Heebe with reservations, 302 F.Supp. at 74, only to be followed by the grant of a new trial, vacating the decision. (Order, Nov. 24, 1969). Judge Heebe's reservations were well-founded, for it is inconceivable that in 1864 Congress intended Section 85 to reach *intrastate,* but not *interstate,* transactions.

Although the National Bank Act was denoted "An Act to provide a National Currency," 13 Stat. 99, it has long been recognized that Congress' power to provide for a national banking system derives as well from the power to regulate interstate commerce. *McCullough* v. *Maryland,* 4 Wheat. 316, 406 (1819). And with the demise of national banks' powers to issue currency, the commerce clause is left as the principal constitutional basis for the National Bank Act. In *Burns* v. *American Nat'l Bank & Trust Co.,* 479 F.2d 26, 29 (8th Cir. 1973) *(en banc),* the Eighth Circuit held:

> "It seems almost elementary that Congress regulates national banks primarily under the commerce clause, and that the National Bank Act, including 12 U.S.C. §§ 85 and 86, is an Act regulating commerce for purposes of § 1337."[1]

Nor is there any basis for petitioners' argument that Section 85 should be limited to intrastate loans because interstate lending and bank credit cards were unknown to the Congress of 1864. First, statutes dealing with broad

[1] Although Congress sometimes restricts laws regulating commerce to interstate transactions (*e.g.,* the Robinson-Patman Act, 15 U.S.C. § 13) and at other times reaches both interstate and intrastate commerce (*e.g.,* the Sherman Antitrust Act, 15 U.S.C. § 1), there is apparently no instance where Congress has attempted to regulate only intrastate transactions and left similar interstate transactions to be regulated by the states.

policies are not limited in their application to the specific mechanisms of the day. *See, e.g., SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 299 (1946); *cf. Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 395 n.16 (1968).

Second, it is untrue that interstate banking was unknown in the nineteenth century. Petitioners portray banks of that period as unsophisticated, local institutions relying entirely on the immediate community for their business and having little intercourse with other financial institutions. This picture is entirely inconsistent with the facts, both as stated by historians of the period and as revealed by the case law that exists on the subject.

Beginning early in the 1800's, the nation's banks developed and followed a wide variety of interstate financing practices aimed at linking the states commercially. The simplest of these practices was the conventional loan on a promissory note. In spite of its paucity, the case law provides a surprising number of examples of such loans. *In re Wild*, Fed. Case No. 17,645 (S.D.N.Y. 1873), arose from a series of loans made by a New York national bank to a Michigan corporation. Likewise, in *Manufacturer's Nat'l Bank* v. *Baack*, Fed. Case No. 9,052 (S.D.N.Y. 1871), an Illinois national bank, as creditor, sued a New York citizen seeking injunctive relief and the appointment of a receiver. *See also Cadle* v. *Tracy*, Fed. Case No. 2,279 (S.D.N.Y. 1873) (suit by receiver of an Alabama national bank against a New York national bank); *Farmer's Nat'l Bank* v. *McElhinney*, 42 Fed. 801 (S.D. Iowa 1890) (suit by Illinois national bank against a citizen of Iowa); *Petri* v. *Commercial Nat'l Bank of Chicago*, 142 U.S. 641 (1892); *Merchants' & Manufacturers' Nat'l Bank* v. *Stafford Nat'l Bank*, Fed. Case No. 9,438 (D.Conn. 1877); *First Nat'l Bank of Trinidad* v. *First Nat'l Bank of Denver*, Fed. Case No. 4,810 (D.Colo. 1878); *First Nat'l Bank* v. *Forest*, 40 Fed. 705 (N.D. Iowa 1889); and *Orange Nat'l Bank* v. *Traver*, 7 Fed. 146 (D. Ore. 1881).[2]

Nor were interstate loans uncommon prior to the passage of the Act. In his preeminent work on the history of American banking, Fritz Redlich notes that very substantial interstate loans were made at least as early as the 1820's:[3]

> "In the 1820's . . . the Morris Canal and Banking Company, a New Jersey improvement bank which became important as a banking enterprise in the 1830's, needed funds for building its canals. It issued two series of post notes of $300,000 and $500,000, respectively, which were bought by the Bank of New York." *F. Redlich, The Molding of American Banking*, Pt. I, 49 (1947) [hereinafter cited as Redlich].

Conventional loans, moreover, were but one of many ways in which the banks of the 1800's engaged in interstate finance. Perhaps even more important was the practice of

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[2] Professor James provides another, particularly striking example of an interstate loan from the same period:

> "Chicago was the arena of a speculative battle, quite early in the period, that attracted attention from all over the world and had serious repercussions in many parts of the United States. Harper, a prominent operator on the Board of Trade, decided at the end of 1886 to corner the wheat market, and carried on his campaign for months in the face of repeated bear raids and steadily growing visible supplies of grain. Adding to his own fortune the entire resources of the Fidelity National Bank of Cincinnati, and *borrowing heavily from banks in all parts of the country*, ..."
>
> C. James, *The Growth of Chicago Banks* 546 (1938) (emphasis supplied).

[3] See also Klebaner, *Commercial Banking in the United States: A History* 31 (1974) [hereinafter cited as Klebaner]; Fenstermaker, *The Development of American Commercial Banking: 1782-1837* 17 (1965) [hereinafter cited as Fenstermaker].

discounting already issued debt obligations.[4] In 1814,[5] state banks began to discount and redeem notes issued by out-of-state banks. The notes of country banks in particular were bought up at a discount by the larger banks when they reached commercial centers and were then sent back to the issuing bank to be paid. The practice extended to notes issued by the larger out-of-state banks as well:

> "On behalf of their stockholders and other customers, shortly after having been set up, this bank [the New England Bank] undertook the collection of country notes at cost within and outside the state. . . . At the same time the New England Bank began to specialize in collecting New York notes and in transporting specie thence to Boston, thereby eliminating New York notes from the New England circulation." Redlich, Pt. I, at 69.[6]

In the face of the fact that conventional loans, discounts, and interest payments on demand deposits broached state lines almost from the beginning of the 1800's, petitioners' contention that the National Bank Act did not contemplate interstate loans presses the limits of credulity.[7]

To put the matter to rest, the 1887 amendment to the National Bank Act, 24 Stat. 552, should be considered. By that amendment Congress made it clear that national banks could sue or be sued in federal courts under principles of

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[4] Discounting is expressly covered by Section 85 of the Act.

[5] This date marks the point at which banks first became involved in discounting. The practice itself, however, began a few years before among money brokers. See Redlich, Pt. I, at 68.

[6] See also Fenstermaker at 42.

[7] It should not be forgotten that the Second Bank of the United States had, in 1830, no less than 25 branches in 8 cities. It would be difficult to characterize such an institution, which, when it guaranteed bonds, gave them the "impress that was to make them pass in the markets of the world," as either local or unsophisticated. *See* J. Knox, *History of Banking in the United States* 63, 78 (1900).

diversity jurisdiction. That this question had been disputed for a number of years and that Congress felt it necessary to make specific provision for it indicates that disputes requiring recourse to the courts between national banks and residents of other states were no infrequent matter, and it can only be concluded that most of those disputes must have arisen from interstate banking transactions. *See Petri* v. *Commercial Nat'l Bank of Chicago,* 142 U.S. 641, 651 (1892).

B. The "Plain Language" of Section 85 Should Not Be Ignored.

Minnesota makes the extraordinary argument that the Court of Appeals in *Fisher* should be censured for relying on the plain language of Section 85. (State of Minnesota Br. at 29). Minnesota's reliance on *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 9 (1976), is misplaced. *Train* presented the situation of a statutory provision whose words were clear, but if read literally, would have set the Environmental Protection Agency against the Atomic Energy Commission. Moreover, the issue whether "pollutants" under the Federal Water Pollution Control Act included radioactive materials controlled by the AEC had been *explicitly* addressed in the House Committee Report, which stated that they were not included. *Id.* at 11. In these circumstances, the Court looked behind the "plain language."

The more common situation is where such explicit definition is lacking, as in *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260 (1945), where the Court held:

> "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

C. The Court's Decision in Tiffany Should Not Be Overruled or Even Considered.

Petitioners do not ask the Court to overrule its decision in *Tiffany* v. *National Bank of Missouri,* 85 U.S. 409 (1874), and they do not treat it as within the scope of the issues to be reviewed by the Court. (Marquette Bank Br. at 24-28, 37; State of Minnesota Br. at 30). Such overruling is urged in the amicus brief of the Conference of State Bank Supervisors. (Conference Br. at 16-41).

The Conference has filed its brief in these cases not to aid the Court in deciding the question presented by petitioners, but instead to attack *Tiffany.* FNBC submits that this is not the proper time to discuss *Tiffany* in depth and offers the following comments only to indicate that any review of *Tiffany* should await full exploration in an appropriate case.

First, there is no *general* purpose in the National Bank Act to maintain national-state bank equality in all respects. In those areas where Congress has considered equality desirable, such as in branch banking, it has expressly legislated. In other areas, Congress has treated national banks differently. For example, in *Farmers' & Mechanics' Nat'l Bank* v. *Dearing,* 91 U.S. 29, 35 (1875), the Court held that the penalty for usury provided by the National Bank Act was exclusive of state law remedies even though state law was more severe and state banks would thereby be penalized more heavily than national banks for the same conduct. Similarly, national banks have venue privileges unequalled by state banks. 12 U.S.C. § 94.

Interest rates are another area where Congress chose to favor national banks. If Congress intended that national banks could charge only the rate of interest allowed state *banks,* it could readily have worded Section 85 to provide

it. Nor can the 1933 amendment providing for the alternate rate of one per cent above the federal discount rate be ignored. The Conference argues that it is meaningless because it is usually below state bank rates. (Conference Br. at 38 n.55). To the contrary, the passage of the 1933 amendment contemplates instances when one per cent above discount will exceed state rates and demonstrates Congress' willingness to allow national banks to charge higher rates than state banks.

Second, the fact that Congress has never amended Section 85 to reverse *Tiffany* cannot be ignored. *Tiffany* is no ordinary interpretation of a statute. The decision was almost contemporary with the passage of the Act. Justice Strong, who wrote the opinion in *Tiffany,* and Justice Clifford had served in the House of Representatives before the Civil War and were therefore familiar with the workings of the legislature. Marquis, *Who Was Who in America 1607-1896* at 111, 513 (1963). Justice Bradley in the 1860's was a close observer of federal legislation involving commerce and has come to be recognized as one of the foremost experts in the field. *See generally* Note, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases,* 54 Harv. L. Rev. 977 (1941). The Court in *Tiffany* declared that it understood Congress' intent in enacting Section 85, 85 U.S. at 412-13, and again in *Farmers' & Merchants' Nat'l Bank* v. *Dearing, supra,* stated:

> "There was reason why the rate of interest should be governed by the law of the state where the bank is situated. . . ." 91 U.S. at 35.

That the Court in such cases as *Helvering* v. *Hallock,* 309 U.S. 106 (1940), and *Boys' Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970), reconsidered prior statutory interpretations means only that they were exceptional

cases. The general rule is explained by Justice Black in his dissenting opinion in *Boy's*:

> "When this Court is interpreting a statute, however, an additional factor must be weighed in the balance. It is the deference that this Court owes to the primary responsibility of the legislature in the making of laws. Of course, when this Court first interprets a statute, then the statute becomes what this Court has said it is. *See Gulf, C. & S.F.R. Co.* v. *Moser,* 275 U.S. 133, 136 (1927). Such an initial interpretation is proper, and unavoidable, in any system in which courts have the task of applying general statutes in a multitude of situations. B. Cardozo, The Nature of the Judicial Process 112-115 (1921). The Court undertakes the task of interpretation, however, not because the Court has any special ability to fathom the intent of Congress, but rather because interpretation is unavoidable in the decision of the case before it. When the law has been settled by an earlier case then any subsequent 'reinterpretation' of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute." *Id.* at 257-58.

The National Bank Act was re-enacted with some revisions in 1874, 18 Stat. 123, but no effort was made by Congress to "correct" *Tiffany.* Furthermore, it cannot be said that *all* of Congress' disinclination to revise Section 85 antedates significant litigation involving the statute. By 1974, when Section 85 was last amended, the Comptroller of the Currency had issued more than eighty rulings over a forty-year period applying *Tiffany, Commissioner* v. *First Nat'l Bank of Maryland,* 300 A.2d 685, 690-91 (Md. Ct. App. 1973), and had issued a formal regulation incorporating the most-favored lender rule. 12 C.F.R. § 7.7310. And, at the time of the 1974 amendment, *Tiffany* had recently been followed in *Partain* v. *First Nat'l Bank of Montgomery,* 336 F.Supp. 65, 66-67 (M.D. Ala. 1971), *rev'd on other grounds,* 467 F.2d 167 (5th Cir. 1972), and *Northway Lanes* v. *Hackley Union Nat'l Bank & Trust Co.,* 464 F.2d 855, 861-64 (6th Cir. 1972).

Nor is the development of more complex interest laws or the increase of legislation regarding Section 85 in the past decade of any significance. Given the obvious disinclination of Congress in 1864 to allow states to discriminate against national banks by giving advantageous rights to state banks, there is no basis for the Conference's suggestion that Congress would have been more favorably disposed to states granting advantages to other state-chartered institutions, such as savings and loan associations or finance companies, provided only that they were not called banks.

The long standing acceptance of *Tiffany,* coupled with Congress' failure to reject its interpretation of Section 85, argues significantly against overruling that decision. *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 733 (1975).

II. IF FISHER SHOULD BE OVERRULED, THE DECISION SHOULD NOT BE RETROACTIVE.

FNBC has relied on the *Fisher* analysis in establishing its interest rates. If the Court overrules *Fisher,* unless such decision were made prospective, FNBC (and numerous other banks that have relied on *Fisher*) will undoubtedly be confronted with class actions seeking penalties under Section 86 of the National Bank Act, 12 U.S.C. § 86.

In *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106-07 (1971), the Court addressed the question of retroactivity in civil cases:

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling a clear past precedent on which litigants

may have relied, see, e.g., *Hanover Shoe* v. *United Shoe Machinery Corp., supra,* at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen* v. *State Board of Elections, supra,* at 572. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter* v. *Walker, supra,* at 629. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' *Cipriano* v. *City of Houma, supra,* at 706."

All of the relevant factors would favor prospective application here.

A. Overruling *Fisher* Would Establish A New Principle Of Law.

There can be no question that overruling *Fisher* would establish a new principle of law. There are no inconsistent decisions by any circuit, nor in the highest court of any state. Moreover, there is no requirement that the decision overruled be one of the highest court having jurisdiction in order for prospective application to be appropriate. *Chevron,* for example, involved overruling decisions of the Court of Appeals for the Fifth Circuit. 404 U.S. at 107. *See also Anderson* v. *Santa Anna,* 116 U.S. 356, 362 (1886).

Nor would an overruling decision here be "clearly foreshadowed." The Seventh Circuit's decision in *Fisher* was followed by the Eighth Circuit, *Fisher* v. *First Nat'l Bank of Omaha,* 548 F.2d 255 (8th Cir. 1977), the Supreme Court of Minnesota, *Marquette Nat'l Bank* v. *First of Omaha Service Corp.,* 262 N.W.2d 358 (Minn. 1977), and

an Iowa district court. *Iowa* v. *First of Omaha Service Corp.,* Equity No. CE 3-1300 (Dist. Ct. Iowa, July 6, 1977), 5 CCH Cons. Credit Guide ¶ 97,160.

B. Retroactive Application Would Not Further The Purpose Of Section 85 And Would Be Inequitable.

It is clear that the functional purpose of Section 85 is to inform national banking associations of the applicable rules governing their interest rates, *i.e.,* to provide guidelines that banks may rely upon in structuring and conducting their business. As a prescriptive rather than a fundamental rule, Section 85's purpose would not be furthered by retroactive application. *See Linkletter* v. *Walker,* 381 U.S. 618, 629 (1965).

It is well-established that judicial interpretations should seek to avoid, not discover, usury. In *Fahs* v. *Martins,* 224 F.2d 387 (5th Cir. 1955), the question was whether interest on overdue interest payments would be considered for purposes of the usury laws. Either Florida law, which would consider the interest for purposes of usury, or New York law, which would not, could have been appropriately applied. In choosing to apply the New York law, Judge Tuttle stated:

> "[W]ith respect to the question of usury, it may be stated as a well-established rule that a provision in a contract for the payment of interest will be held valid in most states if it is permitted by the law of the place of contracting, the place of performance, or any other place with which the contract has any substantial connection." *Id.* at 397.

Accord, Seeman v. *Philadelphia Warehouse Co.,* 274 U.S. 403, 407-08 (1927). The rationale behind this validation doctrine is explained in the *Restatement (Second) of Conflict of Laws* (1971):

> "A prime objective of both choice of law . . . and of contract law is to protect the justified expectations of the parties. Subject only to rare exceptions, the parties will expect on entering a contract that the provisions of the courts will not apply an invalidating rule to strike down the contract unless the value of protecting the justified expectations of the parties is outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied. *Usury is a field where this policy of validation is particularly apparent.*" (§ 203, Comment b; emphasis supplied).

Since there is no public interest that would be served by exposing banks that relied on *Fisher* to claims of usury, any decision of this Court impairing *Fisher* should be prospective only.

CONCLUSION

For the reasons stated above, the decision of the Minnesota Supreme Court should be affirmed. But if that decision is reversed, the new interpretation of Section 85 should be declared prospective only.

Respectfully submitted,

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August 2, 1978

see

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